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No. 85-2027

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RONNIE G. MILLIGAN,
Petitioner,

v.

THE STATE OF NEVADA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court should decline discretionary review in this matter in accordance with Rule 17.1 of the rules of the Supreme Court.

A. Whether the determination of the Nevada Supreme Court that it was error for the trial court to refuse inquiry on voir dire regarding belief in the addage of "an eye for an eye" was a Constitutional error or error based upon state law and whether such determination was correct.

B. Whether, assuming the Nevada Supreme Court determination that the error was of federal constitutional magnitude, the Nevada Supreme Court could properly apply a harmless error analysis.

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OPINIONS AND JUDGMENTS DELIVERED BELOW

The petitioner, Ronnie G. Milligan, seeks certiorari from this Court to review the decision of the Supreme Court of Nevada reported in Milligan v. State, 101 Nev. 627, 708 P.2d 289 (Adv.Op. 129, filed Oct. 28, 1985) (reprinted in Appendix A in the Petition for Writ of Certiorari). The state supreme court affirmed the judgments of conviction for murder and robbery and the sentence of death. The Supreme Court of Nevada denied rehearing without comment in an unreported decision on April 3, 1986.

JURISDICTIONAL STATEMENT AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The jurisdiction of this Court is invoked under section 1257(3) of Title 28 of the United States Code. The Petition for Writ of Certiorari has set forth the pertinent text of the constitutional

provisions which may be implicated in this case. See U.S. Const., amend. VI; id., amend. XIV. Additionally, pertinent state statutes regarding voir dire and harmless error may be involved in this case. See Nev. Rev. Stat. §§ 175.031, 175.051, 177.255 (1985) (reprinted herein as Appendix A).

STATEMENT OF THE CASE

For the purposes of consideration of the petition for writ of certiorari only, respondent adopts the statement of the case set forth in the petition for writ of certiorari. Nevertheless, in order for this Court to make a proper assessment of the propriety of certiorari in this action, respondent believes that a somewhat more detailed review of some of the facts concerning voir dire is necessary. The facts stated herein are supported by the record which was before the Nevada Supreme Court and citation will be made to

the transcript of jury selection which was before the state supreme court as volume 3 of the Record on Appeal.

In his direct appeal to the Nevada Supreme Court, petitioner claimed that the trial judge improperly restricted the scope of voir dire by refusing to allow defense counsel to examine one juror, an Edyth Hascall, regarding her belief of the "eye for an eye theory" of punishment. This juror was the twelfth of thirty-three potential jurors examined individually by the court and by counsel. See Nev. Rev. Stat. §§ 175.031, 175.051 (1985) (Appendix A). Petitioner was represented by three attorneys during voir dire.

Before the questioning of prospective juror Hascall, eleven other prospective jurors were questioned. Questions regarding religious affiliation and religious or moral objections regarding the death penalty were discussed with four of these

first eleven prospective jurors. Transcript of Jury Selection at 73, 84, 122, 183-84, 200-01. In addition to these questions, all jurors were asked questions on such varied topics as media influence, views on alcoholism and psychiatric testimony, and beliefs regarding the death penalty. The separate questioning of prospective juror Hascall contained similar topics of discussion. Id. at 217-43. At one point, defense counsel asked the prospective juror whether she had "any particular, specific religious convictions?" Id. at 221, lns. 6-7. She replied, "Definitely. I'm a Baptist. I'm a Clerk in the Baptist Church and I attend regularly." Id., lns. 8-9. The inquiry immediately switched to other topics until a short time later when the following colloquy occurred:

> Q: Do you know whether the Baptist Church has a particular stand on the death penalty?

[Prosecutor]: I object to that.

The Court: Yes or no.

[Prosecutor]: It's not relevant. It's whether or not she has an objection to it.

The Court: I think that's better, if she has a view of it.

[Defense Counsel]: Your honor, I think she told us that she does a lot of work in the church and I would like to know if this would influence --

The Court: You can ask her what her stand is and what the --

[Defense Counsel]: I'll ask that a little later, Mrs. Hascall.

Id. at 222, lns. 12-26. The inquiry again switched to such other topics as knowledge of prospective witnesses, dealings with the district attorney's office, whether the prospective juror had been a victim of a crime, the prospective juror's views of alcoholism, and the prospective juror's views regarding the death penalty. Id. at 223-29.

The inquiry then reached the point relative to petitioner's claim before this Court with the defense counsel making a

statement regarding history:

> Q: The way that the jury system has been set up is one thing and the way the court operates is another thing, but way back many years ago, people used to be punished under the theory of an eye for an eye--
> [Prosecutor]: Go ahead. I will --
> [Defense Counsel]:
> Q. Do you believe in an eye for an eye theory?
> [Prosecutor]: I think I'll object to that question. I don't think it is relevant to this procedure.
> The Court: I will sustain the objection. I'll not be giving any such instruction.

Id. at 229, lns. 1-11. Defense counsel did not respond to the objection or the court's ruling and immediately moved to other areas of inquiry. Before the objection of the State regarding the "eye for an eye theory," defense counsel was informed by the juror that she would not automatically vote for the death penalty upon a conviction of first-degree murder. Id. at 228, lns. 25-31. Further inquiry in the area was also not foreclosed. The

prosecutor subsequently asked the juror if she could set aside any "tenets of the church" if she had any and follow the instructions of the court. She said that she could and affirmed the court's belief that she had no religious conviction one way or the other. Moreover, the juror stated, "The Bible says to follow the law of the land. That takes care of it." Id. at 238-39.

Again, in order to be satisfied fully, defense counsel was allowed to conduct a supplemental voir dire of the juror and again passed for cause. Id. at 241-42. Defense counsel was now aware of what would be allowed during a discussion regarding religious scruples. In fact, defense counsel inquired into the religion of at least fourteen of the next and final twenty-one prospective jurors. See id. at 248, 271-72, 322, 334, 351, 367, 420, 455, 469, 491, 522, 548, 588, 612. The

prosecution inquired into this area with one juror not so questioned by the defense. Id. at 266, lns. 11-14. Of the eight peremptory challenges allowed, the defense waived its last four. Id. at 539, 540, 543. As found by the Nevada Supreme Court, petitioner was subsequently convicted of the sledge hammer murder of the seventy-seven year old female victim and robbery with a deadly weapon. Petitioner was sentenced to death following a separate penalty hearing.

SUMMARY OF THE ARGUMENT

This Court should decline to review the decision of the Supreme Court of Nevada. In the first place, the State of Nevada contends that the state supreme court did not and could not have found that the failure of the trial court to allow questioning of a prospective juror regarding the "eye for an eye theory" was a federal constitutional error. The error

was, at most, that of state law. Secondly, even though the supreme court found error, whether of state or federal constitutional magnitude, such error was clearly only technical and harmless in the context of the entire jury selection process and trial. In this regard, the decision of the state supreme court is not in conflict with the decision of other state courts of last resort or federal courts of appeals. Nor is the decision one which presents an important question of federal law which should be settled by this Court or which is in conflict with the decisions of this Court. See Sup.Ct.R. 17.1(A)-(C).

ARGUMENT

Respondent contends that a review of the decision of the Nevada Supreme Court would be an unnecessary expenditure of this Court's resources. In these proceedings, petitioner contends that the finding by the state supreme court of error during

jury selection is not subject to a subsequent harmless error analysis. Respondent contends that any review of the harmless error analysis must be preceded by determination of the magnitude of any error at all.

A. The Claim of Error During Jury Selection.

Petitioner has set out in full in the appendix to his petition the decision of the Nevada Supreme Court. That court determined that the trial court erred when it sustained an objection to the question by defense counsel as to whether a prospective juror believed in the Biblical expression of "an eye for an eye." The decision of the state supreme court reviewed this issue briefly and concluded,

> A defendant is entitled to explore the prospective juror's values and personal convictions, including those reflected in or reflective of religious beliefs. We hold that the trial court erred when it ruled that the

> prospective juror's belief in the adage of "an eye for an eye" was irrelevant. Nevertheless, we further hold that under the guidelines of Chapman v. California, 386 U.S. 18 (1967), reh'g denied, 386 U.S. 987 (1967), such error was harmless beyond a reasonable doubt as the prospective juror involved stated unequivocally that she could put aside any personal beliefs and follow the law as instructed by the judge.

Milligan v. State, 101 at _____, 708 P.2d at 293.

The decision of the Nevada Supreme Court finding error does not appear to have been based upon federal constitutional law. Nevada law states that counsel is permitted to supplement the voir dire "as the court deems proper. Any supplemental examination must not be unreasonably restricted." Nev. Rev. Stat. § 175.031 (1985). This Court has held, "The Constitution does not always entitle a defendant to have questions posed during voir dire specifically directed to matters

that conceivably might prejudice veniremen against him. . . . Voir dire 'is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.'" Ristaino v. Ross, 424 U.S. 589, 594 (1976), quoting Connors v. United States, 158 U.S. 408, 413 (1895).

As noted above, defense counsel was allowed to inquire, and did inquire, into numerous and extended aspects of the beliefs and perceptions of prospective jurors. The state supreme court itself found that the particular prospective juror involved here stated unequivocally that she could put aside her personal beliefs and follow the instructions of the court on the law. The prosecutor had specifically asked whether or not this particular juror could set aside any religious tenets she may have. Defense counsel also asked other jurors what if

any religious affiliations they had and were certainly aware that they could ask whether or not any religious beliefs would interfere with juror's duties. Rather than asking whether this prospective juror adhered to this Biblical expression taken out of context, defense counsel alternatively knew they could have inquired as to whether or not a prospective juror felt that a life should be forfeited for a life taken or whether the death penalty should be automatically imposed upon all those killed. In fact, this was asked by defense counsel of the specific juror involved here. Record of Jury Selection at 228, lns. 25-28.

There are numerous ways in which the obligation of a state to the defendant to impanel an impartial jury can be satisfied without "an inquiry into a specific prejudice feared by the defendant." Ristaino v. Ross, 424 U.S. at 595, citing

Ham v. South Carolina, 409 U.S. 524, 527-28 (1973). In Ham, the question was whether or not the trial court properly rejected proposed questions addressed to the fact that petitioner wore a beard. This Court held that the "refusal to inquire as to particular bias against beards, after his inquiries as to bi s in general, does not reach the level of a constitutional violation." Ham v. South Carolina, 409 U.S. at 528.

In this particular case, the facts show that there was an intensive inquiry on numerous topics and defense counsel was not precluded from examining veniremen based upon their conscientious or religious scruples for or against the infliction of the death penalty. See Witherspoon v. Illinois, 391 U.S. 510, 522 & n. 21 (1968). In the overall context of the jury selection in this case, the trial judge may have been concerned that

discussion of a prospective juror's beliefs about one particular Biblical expression might lead to an inquiry regarding other similar questions. Jurors could have been asked whether they agree that the law of the land should be followed, Romans 1: 1-7, that a person should turn the other cheek, Matthew 5: 38-39, or that we should not judge others, Matthew 7: 1-2; Romans 14: 13. Of course, the true meaning of the "eye for an eye" theory could have been discussed as well. See Exodus 21: 22-25.

The facts indicate in this case that a general inquiry into the views of the jurors regarding the effect of their religious beliefs on following the law could have been and was made by defense counsel. As this Court has stated, "Failure to ask specific questions as the possible effect of educational, political, and religious biases' did 'not reach the

level of a constitutional violation,' . . . ." Hamling v. United States, 418 U.S. 87, 140 (1974). This was not a case involving an interracial crime where an inquiry of racial bias should have been made. See Turner v. Murray, ____ U.S. _____, ___, 106 S.Ct. 1683, 1688 (1986). Nor was this a situation in which religion was involved or where there was an indication that a religious belief may inhibit a juror from performing her lawful duty. In fact, defense counsel was not precluded from asking proper questions and had "the same, or substantially the same, insights into the prospective [jurors'] thoughts by observing [their] demeanor, generally, and by listening to the answers to questions concerning family, education and other matters . . . ." United States v. Barnes, 604 F.2d 121, 142 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980).

Based upon the above authority, it

appears that the finding of error by the Supreme Court of Nevada was based upon state law. As such, even an erroneous application of the harmless error test would have no bearing in this case where a federal constitutional right was not implicated.

B. The Application of The Harmless Error Test.

In the State of Nevada, the state supreme court may render a judgment "without regard to technical error or defect which does not affect the substantial rights of the parties." Nev. Rev. Stat. § 177.255 (1985) (Appendix A). As a matter of federal constitutional law, "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the

conviction." Chapman v. State of California, 386 U.S. 18, 22 (1967). In such a case, a court "must be able to declare a belief that it was harmless beyond a reasonable doubt." Id. at 24. The Nevada Supreme Court stated exactly this in its opinion.

The application of a harmless error analysis was entirely appropriate in the context of a possible error during jury selection. Defense counsel was not precluded from inquiring into the area of religious beliefs as they affected the ability of jurors to render a fair and just verdict and the situation did not involve presentation of evidence or arguments of counsel. In this case, petitioner had three attorneys to represent him and was tried by an impartial judge. As such, "there is a strong presumption that any other errors that may have occurred are subject to harmless

error analysis." Rose v. Clark, _____ U.S. _____, _____, 106 S.Ct. ____, ____, 54 U.S.L.W. 5023, 5026 (July 2, 1986). The harmless error principle has been applied to many constitutional errors as noted by this Court in Rose v. Clark. See, e.g., Delaware v. Van Arsdall, 475 U.S. _____, 106 S.Ct. 1431 (1986) (failure to permit cross-examination concerning witness bias); Rushen v. Spain, 464 U.S. 114 (1983) (per curiam) (denial of right to be present at trial); United States v. Hasting, 461 U.S. 499 (1983) (improper comment on defendant's failure to testify); Moore v. Illinois, 434 U.S. 220 (1977)(admission of witness identification obtained in violation of right to counsel); Milton v. Wainwright, 407 U.S. 371 (1972) (admission of confession obtained in violation of right to counsel); Chambers v. Maroney, 399 U.S. 42 (1970) (admission of evidence obtained in

violation of the Fourth Amendment). Petitioner has not cited any authority to demonstrate that the decision of the Nevada Supreme Court applying the harmless error analysis was incorrect.

If this Court were to grant certiorari, an analysis might have to be made of the entire scope of the jury selection as well as a review of all of the evidence presented at trial and during the penalty phase to make a determination as to whether or not a harmless error analysis was appropriate. After all, error is harmless if, beyond a reasonable doubt, it "did not contribute to the verdict obtained." Chapman v. California, 386 U.S. at 24. Petitioner has failed to present a substantial federal question in this case or show that the decision of the Supreme Court of the State of Nevada is in conflict with applicable decisions of this Court or with federal law.

CONCLUSION

As noted above, petitioner has totally failed to demonstrate the existence of a conflict between the decision of the Nevada Supreme Court and the decision of any other state or federal appellate court with regard to the application of the harmless error analysis. In fact, it appears that the Nevada Supreme Court did not find any federal constitutional error at all and that the harmless error analysis must have been applied only with regard to state law error. The decision of the Nevada Supreme Court applying the harmless error analysis was in fact in accord with the decisions of this Court.

Because it is questionable as to whether there was underlying federal constitutional error upon which the harmless error analysis was applied, this Court should decline discretionary review

of the judgment of the state supreme court. Discretionary review should also be declined as the application of the harmless error analysis was correct as applied to the circumstances of this case.

Respectfully submitted,

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APPENDIX A

Nevada Revised Statutes (1985)

175.031 Examination of trial jurors. The court shall conduct the initial examination of prospective jurors, and defendant or his attorney and the district attorney are entitled to supplement the examination by such further inquiry as the court deems proper. Any supplemental examination must not be unreasonably restricted.

175.051 Number of peremptory challenges.

1. If the offense charged is punishable by death or by imprisonment for life, each side is entitled to eight peremptory challenges.
2. If the offense charged is punishable by imprisonment for any other term or by fine or by both fine and imprisonment, each side is entitled to four peremptory challenges.
3. The state and the defendant shall exercise their challenges alternately, in that order. Any challenge not exercised in its proper order is waived.

177.255 Court to give judgment without regard to technical errors. After hearing the appeal, the court shall give judgment without regard to technical error or defect which does not affect the substantial rights of the parties.